OCT 29 1954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 428

H. A. PHILLIPS, Trustee for the Douglas Sulphur Company, Bankrupt, *Petitioner*,

AGAINST

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, H. A. Phillips, Trustee for Douglass Sulphur Company, Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 9, 1954 (R. 467), reversing a judgment of the District Court of the United States for the Southern District of Texas in favor of Petitioner (R. 444), and also the order of said Court overruling the motion for rehearing, entered on June 2, 1954, in Cause No. 14,622, on the docket of that Court.

Official and Unofficial Reports of Courts Below

The opinion of the Court of Appeals is reported as TEXAS AND NEW ORLEANS RAILROAD COMPANY v. H. A. PHILLIPS, Trustee in Bankruptcy of Douglass Sulphur Company, Bankrupt, 211 Fed. 2d 419, set forth in the Transcript (R. 462-466), and is found in the Appendix A to this Petition.

The opinion of the District Court for the Southern District of Texas, Houston Division, by the Honorable T. M. Kennerly, District Judge, is unreported. It is a memorandum opinion, dated February 27, 1953, and found at pages 432-444 of the Transcript of Record, and is found in the Appendix B to this Petition.

Jurisdictional Statement

Jurisdiction to issue the writ requested is provided for in Title 28, U. S. CODE, Section 1254 (1).

Jurisdiction under the law and facts in this particular case is invoked under Rule ~~38. 5.~~ 19-1 (b) of the Revised Rules of this Court. Petitioner urges that the Court of Appeals has rendered a decision on important questions of Federal law which have not been, but should be, settled by this Court, and has decided a Federal question in a way in conflict with applicable decisions of this Court, and has decided a Federal question in conflict with the decision of another Circuit Court of Appeals on the same matter.

The trial Court's judgment was rendered on March 9, 1953 (R. 444-445). The judgment of the Court of Appeals reversing the trial Court's decree, was dated and entered on April 9, 1954 (R. 467). By order of Judge Holmes, entered April 29, 1954, time within which to file

the Appellee's motion for rehearing was extended until May 25, 1954 (R. 471). Petition for rehearing seasonably filed by the Appellee (R. 472-482) was denied on June 2, 1954 (R. 483) without written opinion. By order of Mr. Justice Burton, entered August 27, 1954, time within which to file petition for certiorari was extended to October 30, 1954.

Questions Presented For Review

Does the Bankruptcy Court have jurisdiction over a petition by the Trustee in Bankruptcy to require the Respondent to convey to the Trustee, in accordance with the provisions of a lease between the Bankrupt and the Respondent, certain property covered by the lease under an option provided for within such lease; where the premises and the lease in question (the chose in action) have at all times material been in the possession and custody of the Bankruptcy Court, and where, prior to the institution of the Trustee's action the Respondent had, invoking the jurisdiction of the Bankruptcy Court in the same Bankruptcy proceedings, voluntarily brought a summary action for the construction, enforcement and termination of such lease and had further in the same summary proceeding sought the jurisdiction of the Bankruptcy Court for a finding that the option was not enforceable by the Trustee, and which voluntary submission by the Respondent to the Bankruptcy Court's jurisdiction had been unsuccessfully pursued by the Respondent through the Fifth Circuit Court of Appeals.

Statutes Involved

Jurisdiction of the Bankruptcy Courts is controlled by the "Bankruptcy Act", UNITED STATES CODE, Title 11, and the pertinent sections thereof are as follows:

11 U. S. C., Sec. 11

"Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * *

"(6) Bring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy;

"(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *

* * *

"(13) Enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

* * *

"(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act; * * *

"(16) Punish persons for contempts committed before referees;

* * *

"b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

11 U. S. C., Sec. 46

"Jurisdiction of United States and State Courts. a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

11 U. S. C., Sec. 66

"Jurisdiction of Referees. Referees are hereby invested, subject always to a review by the judge, with jurisdiction to (1) consider all petitions referred to them and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before

them, except the power of commitment; * * * (6) perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *"

Statement of the Case

A concise statement of the case upon which this writ is sought was made in the opinion by District Judge Kennerly (R. 432-445), set forth in full in Appendix B to this Petition. The Trustee quotes his statement verbatim from the Record, Pages 432-435, exclusive of footnotes, in order to assist this Court in viewing the issues before it in their true perspective:

"Kennerly, Chief Judge:

"Originally this was a proceeding for the corporate reorganization of the Douglass Sulphur Company. No Plan having been approved, such Company was adjudged a Bankrupt on April 10, 1950, and the case referred to a Referee in Bankruptcy. This is a hearing under Local District Court Rule 25 of the Petition of the Texas and New Orleans Railroad Company (for brevity called Railroad Company) to Review an Order of the Referee denying the Motion of Railroad Company to Dismiss a Petition by the Trustee to require Railroad Company to convey to Trustee, in accordance with the provisions of a Lease between Bankrupt and Railroad Company, certain property covered by such Lease. The matter of the construction and enforcement of such Lease has heretofore been before the Referee, this Court, and the Court of Appeals of this Circuit in summary proceedings brought by Railroad Com-

pany. For a statement of such proceedings see Texas & New Orleans Railroad Co. v. Phillips, 196 Fed. 2d 692.

"It will be observed that it is settled by such proceedings (a) that such lease has not been terminated, (b) that it has been timely assumed by the Trustee, and (c) that the Trustee is entitled to purchase from Railroad Company the property covered thereby for $30,000 cash.

"Seasonably upon the coming down of the Mandate of the Court of Appeals, the Trustee tendered Railroad Company $30,000 in cash, and requested Railroad Company to execute and deliver to him a Deed to such property. This tender Railroad Company refused to accept and also refused to execute and deliver a Deed. Thereupon, the Trustee filed with the Referee his Motion and Petition, setting forth the facts, and praying for an Order requiring Railroad Company to execute and deliver such Deed. Also that Trustee be awarded damages against Railroad Company for the failure of Railroad Company to execute and deliver such Deed. Thereupon, the Referee signed an Order, which was duly served on Railroad Company, requiring it to show cause why such Deed should not be so executed and delivered. Railroad Company then moved to dismiss such Motion and Petition of the Trustee, the Referee denied such Motion to Dismiss, and Railroad Company has brought this Petition to Review his action."

All proceedings herein in the trial Court set forth in the Record were originated in the Bankruptcy proceedings on file in the District Court of the United States for the Southern District of Texas, Houston Division, styled In the Matter of Douglass Sulphur Company, Bankrupt, No. 2216 In Bankruptcy, which is still pending in the said District Court.

A review of the Record in the former proceedings in the same cause shows that:

(1) on April 10, 1950, the Debtor was adjudicated a Bankrupt and the District Court referred the case to Elbert Roberts, Referee (R. 10);

(2) on May 10, 1950, Railroad Company filed with the Referee its Petition to Terminate the Lease, and its prayer that the Lease be adjudged to be terminated and that the Trustee be ordered to surrender possession of the leased premises to the Railroad Company (R. 14-15);

(3) the Lease in question was attached as Exhibit "A" to the Railroad's Petition set forth in the Record at Pages 14 and 15 and appears in the Record from Pages 17 through 27. The option therein which is the subject matter of these proceedings is set forth under article VIII.(b) in the Record at Pages 24 and 25;

(4) the Trustee filed answers on June 20, 1950, August 11, 1950, and September 26, 1950 (R. 439);

(5) on September 25, 1950, the Trustee filed his Motion seeking authority to exercise the option in the Lease and to tender the required payment to the Railroad (R. 289-292);

(6) on September 26, 1950, the Referee entered his Order authorizing the Trustee to exercise the option in the Lease to purchase the property from the Railroad (R. 287-289);

(7) on October 26, 1950, the Railroad filed with the Referee its Motion to set aside an Order entered by the Referee accepting the bid of the Ranger Chemical Company for such property, and its prayer was as follows:

> "Wherefore, your Petitioner, in the alternative to its motion to terminate the lease, prays that the order accepting the bid of the Ranger Chemical Company for the so-called Harrington Street leasehold estate be set aside and that the said option be ordered terminated."

(8) on December 7, 1950, the Railroad filed with the Referee in Cause No. 2216, its First Amended Original Petition (R. 226), and in its prayer, (R. 228-229) the Railroad asked that the Court declare the Lease terminated under its terms, that the Trustee be required to vacate and surrender possession of the property to the Railroad, that the Court determine that the option to purchase contained in the Lease was a right personal to the Bankrupt which could not be exercised by the Trustee, and that the Order accepting the bid of the Ranger Chemical Company for the property covered by the Lease be set aside;

(9) without dispute by any party hereto, it is evident from all the proceedings, records, testimony and pleadings of the respective parties hereto set forth in the Trustee's application for relief (R. 312-327) and in the Record as a whole that the "Harrington Street property", which are the premises which are the subject matter of this suit, have been at all times material hereto prior to the adjudication of Bankruptcy, in the hands of the Bankrupt,

Douglass Sulphur Company, and were so at the time of such adjudication, as well as prior thereto at the time proceedings were initiated in the above designated action in September of 1949. And since such proceedings were filed and begun, the "Harrington Street property" has been at all times in the possession and in the custody of the Bankruptcy Court in the above designated cause and has been in the actual possession, continuously of the Debtor under the orders of the Court and/or in the possession of the Trustee, as well as in custodia legis. The Lease agreement (R. 17) between the Railroad and the Debtor, Douglass Sulphur Company, which has heretofore been the subject of litigation in this same cause No. 2216 in the trial Court between the Trustee and the Railroad (R. 433, 463 and TEXAS AND NEW ORLEANS RAILROAD COMPANY v. PHILLIPS (5th C.C.A.), 196 Fed. 2d 692), for the cancellation of which the Railroad sought affirmative relief and remedies as well as a construction thereof in this same cause (R. 14 and 226) has been also at all times material hereto, and is, in custodia legis and in the actual possession of the Debtor and/or the Trustee and under the orders of this Court;

(10) the Referee denied Respondent Railroad the relief prayed for, and Respondent Railroad filed its petition and supplemental petition to review the action of the Referee and actively prosecuted the same to final judgment in the Circuit Court of Appeals. TEXAS AND NEW ORLEANS RAILROAD COMPANY v. PHILLIPS, supra.

The Petitioner contends that the jurisdiction of this cause lies in the Bankruptcy Court below, under the above cited provisions of the Bankruptcy Act, as well as the applicable decisions of this Court and the Circuit Courts of Appeal, for two reasons:

(1) When the Railroad Respondent sought, invoked and consented to the jurisdiction of the Referee and the Bankruptcy Court in the former proceedings in the same cause of action and proceedings, by its own volition, involving such Lease and the property covered thereby and the option to acquire the same, the Respondent thereby consented to the jurisdiction of the Referee and the Bankruptcy Court with respect to all questions between the Trustee and the Railroad Respondent, involving such Lease or the property covered thereby, including this proceeding. As stated before, the Referee and the District Court so concluded (R. 432-441 and 345);

(2) The property which is the subject matter of this controversy and the option to acquire it in the Lease between the Railroad and the Bankrupt are and have been in the actual and constructive possession of the Bankruptcy Court and/or the Bankrupt at all times material hereto and were so at the time of the filing of the petition in Bankruptcy as well as at all times since.

Reasons for Granting the Writ

A.

The question presented here is one of first impression as this precise question has not yet been before the Court. It is an important question of Federal law under the Bankruptcy Act which has not been, but should be, settled by

this Court. It is a question which is of tremendous importance in the administration of the Bankruptcy Act, and is one of such importance to the further administration and application of the Act that it should be settled by this Court.

The decision of the Court of Appeals (Appendix A), if permitted to stand, will create an irreconcilable conflict with other decisions by this Honorable Court and the Circuit Courts of Appeal which have heretofore set forth the guiding principles in determining the summary jurisdiction of the Bankruptcy Court.

The Court below completely ignored and failed completely to consider, although it was specifically pointed out, the previous acts of the Railroad Respondent below in the same proceedings in instituting and prosecuting summary proceedings with reference to the same subject matter against the Trustee in the same Court. In the Court's opinion (R. 462-466) only casual attention to the issue of consent was given by the following statement (R. 464): "Consent of the lessor is lacking, because it has consistently resisted the petition of the trustee and has made formal protest against the exercise of summary jurisdiction by the bankruptcy court."

The decision of the Court below in this cause, is directly in conflict with the decision of this Court in PAGE v. ARKANSAS GAS CORPORATION, 286 U.S. 270, and in MACDONALD v. PLYMOUTH, 286 U.S. 263. Those cases firmly establish the principle that a claimant such as is the Railroad Respondent here may by his action consent to a proceeding such as is the present proceeding.

Other decisions of this Honorable Court and the other Circuit Courts of Appeal in support of this same principle

and in conflict with the opinion of the Court below are as follows:

CLINE v. KAPLAN, 323 U.S. 97. BACHMAN v. MCCLUER (C.C.A. 8th), 63 Fed. 2d 580. GRAMIL WEAVING CORP. v. RAINDEER FABRICS, INC. (C.C.A. 2nd), 185 Fed. 2d 537. IN RE CALIFORNIA EASTERN AIRWAYS, INC., 95 Fed. Supp. 348. LILIENSTEIN v. CARBERRY (C.C.A. 7th), 92 Fed. 2d 612. IN RE PROKOP, ET AL.,-HEYER, ET AL., v. SCHWEMER (C.C.A. 7th), 65 Fed. 2d 628. JOHN H. PAGE, TRUSTEE, v. ARKANSAS NATURAL GAS CORP., 52 S. Ct. 507, 286 U.S. 269, 76 L. Ed. 1096. OPERATORS' PIANO CO. v. FIRST WISCONSIN TRUST CO., 283 Fed. 904. JAMES TALCOTT, INC., v. GLAVIN (C.C.A. 3rd), 104 Fed. 2d 851, cert. denied, 60 S. Ct. 130. PEOPLE'S NATIONAL BANK OF STRASBURG v. GREEN, 296 Fed. 294. HYMAN v. MCLENDON (C.C.A. 4th), 140 Fed. 2d 76, cert. denied 322 U.S. 739. IN RE INSURANCE BUILDING CORPORATION, 35 Fed. Supp. 456. WHITE v. STEINMAN (C.C.A. 2nd), 120 Fed. 2d 799, cert. denied 214 U.S. 659. WALKER v. LEACH (C.C.A. 10th), 158 Fed. 2d 15. FISH v. EAST (four cases) (C.C.A. 10th), 114 Fed. 2d 177. IN RE PA. COFFEE CO. (D.C. W.D. Penn.), 8 Fed. 2d 98. IN RE PETROLEUM CONVERSION CORP., 99 F. Supp. 899, affirmed 196 Fed. 2d 728, appeal denied 73 S. Ct. 346, 344 U.S. 917, 97 L. Ed. 707. SUSQUEHANNA CHEMICAL CORPORATION v. PRODUCERS BANK & TRUST (C.C.A. 3rd), 174 Fed. 2d 783.

Even in situations where an adverse claimant is in possession of property in controversy in a summary proceeding in bankruptcy, his consent to the jurisdiction of Bankruptcy Court may waive his privilege of plenary suit, as this Court and other Circuit Courts of Appeal have held in the following cases:

CLINE v. KAPLAN, 65 S. Ct. 155, 323 U.S. 97, 89 L. Ed. 97. FISH v. EAST (C.C.A. 10th), 114 Fed. 2d 177. WALKER v. LEACH (C.C.A. 10th), 158 Fed. 2d 15. IN RE MT. FOREST FUR FARMS OF AMERICA, 122 Fed. 2d 232, cert. denied FITZGERALD v. GULF REFINING CO. OF LOUISIANA, 62 S. Ct. 480, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 622, 315 U.S. 826, 86 L. Ed. 1222. Cert. denied 62 S. Ct. 481, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 622, 315 U.S. 826, 86 L. Ed. 1222. Cert. denied FITZGERALD v. HUMBLE OIL & REFINING CO., 62 S. Ct. 481, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 623, 315 U.S. 826, 86 L. Ed. 1222. Cert. denied FITZGERALD v. SHELL OIL CO., 62 S. Ct. 481, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 623, 315 U.S. 827, 86 L. Ed. 1222. Cert. denied FITZGERALD v. FREEPORT SULPHUR CO., 62 S. Ct. 481, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 623, 315 U.S. 827, 86 L. Ed. 1222. Cert. denied 62 S. Ct. 482, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 624, 315 U.S. 827, 86 L. Ed. 1222. Cert. denied FITZGERALD v. COCKRELL, 62 S. Ct. 482, three cases, 314 U.S. 701, 86 L. Ed. 561, rehearing denied 62 S. Ct. 624, three cases, 315 U.S. 827, 86 L. Ed. 1222. IN RE KNOTT, 134 Fed. 2d 833. WHITE v. STEINMAN, 120 Fed. 2d 799, cert. denied 62 S. Ct. 113, 314 U.S. 659, 86 L. Ed. 528.

In COLLIER ON BANKRUPTCY (14th Edition), Section 23.08, Paragraph 1, with respect to the summary jurisdiction of a Bankruptcy Court, it is said in the text:

"Once consent to the summary jurisdiction of the Bankruptcy Court appears, that jurisdiction will be retained for the determination of all the claims of the parties and for the enforcement of all their rights against each other."

Consent having been given, it may not subsequently be withdrawn by a party;[10] nor may the party, upon appeal from the decision, raise the question of want of jurisdiction.[11]

> 'Where an adverse claimant is himself a petitioner for relief in a summary proceeding brought by a trustee, he opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses, including affirmative claims, may be properly litigated in such proceeding. Operators' Piano Co. v. First Wisconsin Trust Co. (C.C.A. 7th) 49 Am. B.R. 545, 283 Fed. 904; Matthew v. Coppin, (C.C.A. 9th) 14 Am. B.R. (N.S.) 19, 32 Fed. 2d 100.'

"Consent, as hereafter demonstrated, may be express or by waiver through failure to raise the proper objection, or may be shown by any act indicating a willingness on the part of the party that his claim or interest be determined summarily by the Bankruptcy Court.[12]"

The notes to this text are as follows:

> [9] "In re Blake (C.C.A., 8th Cir.), 17 Am. B.R. 668, 150 Fed. 279. See also Philips v. Turner (C.C.A., 5th Cir.), 8 Am. B.R. 171, 114 Fed. 726; Honeyman v. Hughes (C.C.A., 9th, 1946), 156 F. (2d) 27.
>
> [10] Operators' Piano Co. v. First Wisconsin Trust Co. (C.C.A., 7th Cir.), 49 Am. B.R. 545, 283 Fed. 904; Matter of Prokop (C.C.A., 7th Cir.), 23 Am. B.R. (N.S.) 375, 65 F. (2d) 628; Honeyman v. Hughes, supra, n. 9.
>
> [11] In re Bacon (C.C.A., 2d Cir.), 20 Am. B.R. 107, 159 Fed. 424; Philips v. Turner (C.C.A., 5th Cir.), 8 Am. B.R. 171, 114 Fed. 726; Boonville National Bank v. Blakey (C.C.A., 7th Cir.), 6 Am. B.R. 13, 107 Fed. 891; Honeyman v. Hughes, supra, n. 9.

Review by District Court of referee's order.—In Matter of Loring (D.C. Mass., 1939) 42 Am. B.R. (N.S.) 875, 30 F. Supp. 758, the Court said: 'It is suggested in the trustee's brief, that question may be raised as to the jurisdiction of the referee to order in summary proceeding the payment to the trustee of the alleged preference. The record is barren of any intimation that Dutchland objected to the proceedings before the referee, and it is now too late to raise the question of jurisdiction.' See also n. 51, infra.

[12] The consent does not have to be formal. Matter of Pinsky-Lapin & Co., Inc. (C.C.A., 2d Cir.), 37 Am. B.R. (N.S.) 576, 98 F. (2d) 776; In re Read-York, Inc. (C.C.A., 7th, 1945), 152 F. (2d) 313; Honeyman v. Hughes, supra, n. 9.

As instances where consent was not found, see Matter of Bergstrom (C.C.A., 7th Cir.), 5 Am. B.R. (N.S.) 16, 1 F. (2d) 288; Matter of Schoenberg (C.C.A., 2d Cir.), 25 Am. B.R. (N.S.) 262, 70 F. (2d) 321."

The only decision cited by the Court below in ruling that consent by the Railroad Respondent was lacking to the jurisdiction is CLINE v. KAPLAN, 323 U.S. 97 (R. 464), which, among other things, specifically restated the two following principles applicable to Bankruptcy Court jurisdiction: Page 98. "A Bankruptcy Court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the Court. THOMPSON v. MAGNOLIA PETROLEUM CO., 309 U.S. 478, 481, 84 L. Ed. 876, 879, 60 S. Ct. 628;" and page 99, "Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial,

may be waived by failure to make timely objection. MACDONALD v. PLYMOUTH COUNTY TRUST CO., 286 U.S. 263, 266, 267, 76 L. Ed. 1093, 1094, 1095, 52 S. Ct. 505." The CLINE case is also authority for the principle that whether or not consent exists depends on the facts of the case. In the CLINE case no affirmative relief had been sought by the adverse claimant in the Bankruptcy Court at any stage, and formal objection to the jurisdiction of the Bankruptcy Court was entered before a final judgment was had therein, while in the present case, the Railroad Respondent not only failed to object to the jurisdiction of the Court at any time in the proceedings which it brought itself, but on the other hand voluntarily initiated and pursued to judgment the jurisdiction of the Bankruptcy Court.

Consequently, the decision of the Court below is directly in conflict with the decisions of this Court and of the other Honorable Circuit Courts of Appeal above decided, and is actually inconsistent with CLINE v. KAPLAN, upon which it relied for its ruling.

To sustain the ruling of the Court below would be tantamount to creating a novel situation, to-wit: that a claimant to rights or interests in property in the possession of the Bankruptcy Court can voluntarily enter into the lists of that Court and joust for the title or right thereto and delivery thereof, and having failed, can then seek to avoid the effects of its own voluntary action in enlisting the aid of such Court by insisting that the Court was without jurisdiction to hear the matter. As convenient and desirable as that may be to the Railroad Respondent, we respectfully submit that is not the intent and purpose of the Bankruptcy Act, and is contrary to the expressed law of this land.

B.

The decision of the Court below is directly in conflict with the many decisions of this Court and the other Honorable Circuit Courts of Appeal voicing the general principle that Bankruptcy Courts have jurisdiction, exercisable in summary proceedings, to adjudicate controversies relating to property over which they have actual or constructive possession and the principle that where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts and the court has ancillary jurisdiction to hear and determine all questions respecting title, possession or control of the property. The jurisdiction in such cases arises out of the possession of the property.

At the risk of overemphasis, Petitioner respectfully reminds the Court that, as set out in the Statement of Facts hereinabove, the Bankrupt and/or the Bankruptcy Court at all times material hereto had actual and constructive possession of the premises which are the subject matter of this action and likewise had actual and constructive possession of the option in the Lease (R. 17, 24, 25), and at the time of the inception of the Bankruptcy proceeding, the Bankrupt had the contractual right with the Respondent to exercise its option to acquire the premises.

The holding of the Court below is in irreconcilable conflict with the holding of this Honorable Court in THOMPSON v. MAGNOLIA PETROLEUM CO., 309 U.S. 478, as follows: "Bankruptcy courts have summary jurisdiction to adjudicate controveries relating to property over which they have actual or constructive possession. And the test of this

jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy".

The Bankrupt and the Trustee were and are in possession of the premises under Lease (R. 17) entitling the lessee and those who hold under him not only to possession for a limited term of years, but for ever in fee simple upon exercise of the contractual right (R. 24, 25) to acquire and hold the premises forever.

The opinion of the Court below is in conflict with its own opinion in CHANDLER v. PERRY (C.C.A. 5th), 74 Fed. 2d 371, from which we quote the following pertinent provisions, pages 372, 373:

> "The questions raised are: May a Court of bankruptcy by summary proceeding do what the trustee has asked? If so, may the referee exercise the jurisdiction?
>
> "(1, 2) A distinction must be observed between proceedings to obtain possession of property belonging to the estate and those whose object is to deal with property of the estate already in the possession of the Court through its officers.
>
> "(3, 4) The jurisdiction to dispose of property rightly in the Court's actual or constructive possession, and as ancillary thereto to deal with all claims of title to or interest in or liens upon it, is much broader. It is not peculiar to Courts of bankrupcy, but appertains to all Courts having possession of property for disposition, and rests largely upon necessity, inasmuch as by a settled principle no other Court is allowed to interfere with property thus in custodia legis. Murphy v. John Hofman Co., 211 U.S. 562, 29 S. Ct. 154, 53 L. Ed. 327; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770; Isaacs v. Hobbs Tie

& T. Co., 282 U.S. 734, 51 S. Ct. 270, 75 L. Ed. 645; Whitney v. Wenman, 198 U.S. 539, 25 S. Ct. 778, 49 L. Ed. 1157. This ancillary jurisdiction in Courts of bankruptcy is ordinarily exercised by summary process either on intervention by claimants asserting an interest or as here by petition on the part of the trustee for a rule against such claimants. The fact that they assert an interest or title adverse to the bankrupt does not require a plenary proceeding, although of course the Court in its discretion might direct the trustee to resort to such. The necessity for prompt disposition of the bankrupt's property in possession of the Court usually justifies summary proceedings. Austin v. Fiske (C.C.A.) 24 F. (2d) 626.

"(5-7) In this record there is no question but that the bankrupt owned the lease originally, and at bankruptcy still owned some interest in it. The trustee asserts that he has actual possession of the leasehold estate and of a producing oil well on one lot of the leased land. No pleading or evidence contradicts this. It does not appear that he got possession irregularly, and wrong conduct is not to be presumed.

"We must hold that so far as appears the bankruptcy Court has rightful possession of the real property and jurisdiction to deal with all interests claimed in it or liens or charges on it, so as to dispose of it fully, and may do so summarily according to the usual practice in bankruptcy."

The opinion of the Court below is in irreconcilable conflict with the opinion of this Honorable Court in JOHN H. PAGE, TRUSTEE, v. ARKANSAS NATURAL GAS CORP., 52 S. Ct. 507, 286 U.S. 269, 76 L. Ed. 1096, affirming (C.C.A., 1931), 53 Fed. 2d 27, cert. granted. The opinion in that case is so pertinent to this proceeding that the opinion of Justice Stone therein is set out in full as follows:

"Petitioner brought this suit in the Arkansas Chancery Court against respondent's predecessor in interest to quiet the title to an oil and gas lease. The cause was removed to the United States District Court for Western Arkansas, where a trial of the issues resulted in a judgment for respondent, which was affirmed by the Court of Appeals for the Eighth Circuit. 53 F. (2d) 27. Both Courts held that the issue with respect to the ownership of the lease was res adjudicata by reason of a proceeding before a referee in bankruptcy, sitting in the district in which the issues with respect to the title presented here, had been decided against the predecessor of petitioner and in favor of the trustee in bankruptcy, through whom respondent acquired its title to the lease.

"The receiver in the bankruptcy proceeding, later appointed trustee, had gone into possession of the lease, claiming it as property of the bankrupt. Lyvers, petitioner's predecessor, filed a petition before the referee, claiming title to the lease, asking that he be put in possession and that the trustee be ordered not to sell the lease. The trustee answered, setting up that Lyvers was trustee of the lease for the bankrupt, and asking that Lyvers execute a deed of the property to the trustee. The matter was heard by the referee, who ordered Lyvers to execute the conveyance. The order was affirmed by the District Court and in conformity with it. Lyvers then conveyed the lease to the trustee.

"The attempt made in the present suit to relitigate the issues involved in the bankruptcy proceeding, is justified chiefly on the ground that the referee in bankruptcy was without jurisdiction to try the issues presented in the proceeding before him and that, for that reason, the order was void and could not operate to adjudicate the issues tendered in the present suit. This Court granted certiorari, 285 U.S. 532, ante, 927, 52 S. Ct. 407, to resolve the jurisdictional question. Many and complicated questions of fact are involved

and were argued here, but as they have been found in favor of the respondent by both Courts below, we do not review them, see Texas & N.O.R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U.S. 548, 74 L. Ed. 1034, 50 S. Ct. 427, and we confine ourselves to the question of the jurisdiction of the referee in bankruptcy.

"The Court below held that the referee in bankruptcy had jurisdiction to decide the issues raised by the petition and answer, by virtue of the fact that the trustee had gone into possession of the lease, and that possession gave the referee as a Court of Bankruptcy jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. Murphy v. John Hofman Co. 211 U.S. 562, 53 L. Ed. 327, 29 S. Ct. 154, 21 Am. Bankr. Rep. 487. It also held that the referee had power to make the order, since Lyvers had participated in the litigation without objecting to its summary form until after the order had been made. We think that the judgment should be affirmed.

"The right asserted before the referee by the trustee in bankruptcy to compel a conveyance to the bankrupt of property adversely claimed, is one which may be asserted by the trustee in a plenary suit. By Sec. 23 (a) of the Bankruptcy Act, U. S. C. title 11, Sec. 46 and Sec. 291 of the Judicial Code, District Courts of the United States, which by Sec. 1(8) of the Bankruptcy Act are Courts of Bankruptcy, are given jurisdiction of all controversies in law or equity between trustees and adverse claimants concerning the property claimed by the trustee. And by Sec. 23(b), 'suits by the trustee shall only be brought or prosecuted in the Courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant * * *.' For reasons stated at length in the

> opinion in No. 714, MacDonald v. Plymouth County Trust Co. decided this day (286 U.S. 263, ante, 1093, 52 S. Ct. 505), we hold that the referee is a Court within the meaning of Sec. 23(b), and that, respondent's predecessor having consented to litigate the issues presented by the petition and answer before the referee, the latter had jurisdiction to decide the issues presented. The order of the referee, in the bankruptcy proceeding, affirmed by the District Court, therefore adjudicated those issues between the parties and they may not be relitigated in the present suit by their successors in interest.
>
> "Affirmed."

The opinion of the Court below is in irreconcilable conflict with the above cited opinions of this Honorable Court and other Circuit Courts of Appeal in holding that the Bankruptcy Court below did not have jurisdiction in rem over the Railroad's "reversionary interest" in the leased premises. Petitioner is compelled to assume that the Court below was swayed heavily by the Court's own decision in BENTON v. CALLAWAY, 165 Fed. 2d 877, affirmed 336 U.S. 132, since the opinion by the Court in this case (R. 464) follows a portion of the BENTON v. CALLAWAY opinion (Page 882) *verbatim*. Petitioner strongly feels that the Court below erred in quoting its prior opinion as authority for its decision in this case, since it failed to include or to have considered those portions of the BENTON case in which it is clearly distinguished from the present proceeding. The Narcissus complex of the Court below would be understandable only if the opinion it reflects is to the same fact image as BENTON v. CALLOWAY. The BENTON case was a reorganization proceeding under Section 77, Bankruptcy Act, 11 U. S. C. A., Section 205. The distinctions of the BENTON v. CALLAWAY case from the present case are set

forth in the attached footnotes, to which emphasis has been added where indicated.[1]

BENTON v. CALLAWAY simply determines the lack of jurisdiction in the Bankruptcy Court to arbitrarily force a railroad or any other party not before the Court either by consent or by actual custody and possession of its interest in the hands of the trustee, to convey a reversionary interest which it has not consented to convey and which it has not contracted to convey. The facts are entirely opposite in the present case, since in the present case, the Railroad had consented to the right of the lessor to acquire its reversionary interest and had contracted to deliver under the option in the Lease, under the terms of the Lease which has been at all times in the actual and constructive possession of the Debtor and Trustee and in the jurisdiction of the Bankruptcy Court. In the instant case, the law attaches to the ownership of the option to acquire the reversion in

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[1] Benton v. Callaway (C.C.A. 5th), 165 Fed. 2d 877, aff'd 336 U.S. 132 (1949).

p. 880

" * * * the bankruptcy court erred in attempting to exercise exclusive jurisdiction over property which the debtor did not own and **upon which it had no lien.**"

p. 880

"A **leasehold estate is personal property** which becomes **subject to the exclusive jurisdiction of the bankruptcy court** upon the filing of a petition by the debtor under said Section 77; but **the lessor's title in fee,** out of which the leasehold was carved, was not an asset of the debtor, and **no claim of title thereto or lien thereon is made by the debtor or its trustee.**"

p. 880

"The basis of the **court's exclusive jurisdiction in rem** is its actual or constructive possession of the debtor's property. It is not limited to the administration of property that belonged to the debtor without question, but **extends to the determination of all questions of title or liens affecting the debtor's estate.**"

fee the legal consequences of possession. It is an intangible res owned by the Trustee and the law attaches to the ownership of intangible property the legal consequences of possession of intangible assets.

The present Lease and the right to determine the present interests of the parties thereto and their successors are clearly within the jurisdiction of the Bankruptcy Court and have been so previously recognized both by the lessor (Railroad) and by the Court below, which consent by the Railroad and recognition by that Honorable Court are res adjudicata. (T. & N. O. RAILROAD v. PHILLIPS, supra.) It is the ownership and actual custody and possession of the Lease and the option terms therein which distinguishes this case from that of BENTON v. CALLAWAY. The Bankruptcy Court not only has jurisdiction in rem over the

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p. 880

"The **suit in the state court, which was enjoined by the judgment below,** was a proceeding **in personam,** between the parties not in reorganization, **over property that might never be acquired by the reorganized company.**"

p. 881

"It was not a controversy over property in the actual or constructive possession of the trustee."

p. 882

"A solvent **corporation, which has appeared specially as** creditor and lessor in a reorganization proceeding, **cannot be constitutionally compelled** against its will **to convey to the debtor a larger and better title THAN WAS GRANTED IN THE LEASE.**"

p. 882

"**The plan did not contemplate that the limited interest of** the debtor in the leased lines **should be converted into a fee-simple title without the consent of the owners.**"

p. 883

"**The suit** in the state court was **intended to prevent the illegal conveyance of** South-Western's **interest that was not subject to the lease.**"

actual leased premises, but over the intangible *contractual* right of the lessee to acquire the reversionary interest of the Railroad therein. The Trustee is in possession of *more* than a leasehold estate. The lessor (Railroad) has not at any time since the beginning of the Lease had a *vested* future interest in the form of a reversion commencing at the termination of the Lease, since it has been at all times contractually subject to the option of the lessee to acquire the same. At all times since the lessor (Railroad) and the lessee (Debtor) entered into their Lease contract, the lessee has been in possession by operation of law of an intangible res or right or interest to acquire the fee simple title and the legal consequences of the Debtor's possession of such intangible res (or contractual right) at the time of bankruptcy, are that his Trustee in Bankruptcy succeeds to the Debtor's possession, and the Bankruptcy Court acquires summary jurisdiction in rem to adjudicate adverse claims respecting the assets.

Clearly, the Court below committed two major grounds of error; namely, the incorrectness of the view of the Court below as to the lack of consent by the Railroad for the Bankruptcy Court to exercise its jurisdiction over the premises and the interest therein, as well as over the parties hereto, and also its blindness as to the actual and constructive possession by the Debtor and Trustee at all times material hereto, not only of the physical premises in question, but of the contractual right and intangible res in the Lease covering such premises between the lessor (Railroad) and the lessee, by which the lessee has the right to conveyance of the fee simple title. The Court below clearly erred in failing to apply the principles above herein urged.

Conclusion

Your Petitioner respectfully submits that the Circuit Court of Appeals for the Fifth Circuit has failed to follow the applicable decisions of this Court and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeals and of this Honorable Court, and that in view of the error committed by the Court of Appeals, and the importance of the question of Federal law involved, a writ of certiorari should be granted, and Petitioner prays this Honorable Court for the issuance of such writ to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

FRED MUCH,
Attorney for Petitioner,
H. A. Phillips, Trustee for the
Douglass Sulphur Company,
Bankrupt,
1308 Commerce Building,
Houston, Texas

I, Fred Much, attorney for the Petitioner in the above styled and numbered cause, do certify that on the _____ day of October, 1954, I did deliver to Mr. Ben White of the firm of Baker, Botts, Andrews & Shepherd, attorneys for the Respondent, Texas and New Orleans Railroad Company, three copies of the foregoing Petition for writ of certiorari in compliance with the Revised Rules of the Supreme Court of the United States.

This the _____ day of October, 1954.

FRED MUCH

I, Ben White, of the firm of Baker, Botts, Andrew & Shepherd, attorneys for the Respondent, Texas and New Orleans Railroad Company, do acknowledge service of three copies of the foregoing Petition of H. A. Phillips, Trustee for the Douglass Sulphur Company, Bankrupt, Petitioner, for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

This the _____ day of October, 1954.

BEN WHITE

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14622

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellant*,

VERSUS

H. A. PHILLIPS, Trustee for the DOUGLAS SULPHUR COMPANY, Bankrupt,

Appellee

Appeal from the United States District Court for the Southern District of Texas

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(April 9, 1954)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HOLMES, Circuit Judge: This is a proceeding by the trustee in bankruptcy against the Texas and New Orleans Railroad Company for specific performance of an option to purchase real property described in a lease for ten years given by the Railroad to the bankrupt. The appellant filed its motion to dismiss the petition for lack of jurisdiction. The referee denied the motion to dismiss, and the court below affirmed.

This is the second time that the parties have been before this court. In an earlier proceeding, reported in 196 F. (2) 692, the appellant sought the cancellation of the lease and the surrender of the leased premises to it. The court denied the petition of appellant, and held that it was not entitled to a cancellation of the lease because it had not been termniated, and the option to purchase was not limited to a sale on credit so as to make it personal to the lessee. The principal question on this appeal is whether the referee in bankrupty had jurisdiction to entertain the petition by the trustee.

We agree with the appellant that the relief prayed for requires a plenary proceeding, and that the bankruptcy court did not have jurisdiction in rem over the railroad's reversionary interest in the leased premises. A suit for specific performance is a suit in personam. It is well settled that, without the consent of the adverse claimant, a court of bankruptcy is without jurisdiction in a summary proceeding to adjudicate a controversy over property held adversely to the bankrupt estate. Harrison v. Chamberlin, 271 U. S. 191; Schumacher v. Beeler, 293 U.S. 367; In re Ballou, 215 Fed. 810; Dreyer v. Perkins, 217 Fed. 889; Chandler v. Perry, 74 F. (2) 371; Collier on Bankruptcy, Sec. 38.09, p. 1425.

In this case, the trustee in bankruptcy has possession of the tangible property described in the lease, but it does not have possession of the railroad's reversionary interest. As in Benton v. Callaway, 165 F. (2) 877, affirmed 336 U. S. 132, the trustee is not disputing the lessor's title but is seeking to acquire it. Consent of the lessor is lacking, because it has consistently resisted the petition of the trustee and has made formal protest against

the exercise of summary jurisdiction by the bankruptcy court. *Cline v. Kaplan,* 323 U.S. 97.

The trustee in bankruptcy is in possession of all the tangible property in controversy, but he has only a leasehold estate therein. The incorporeal reversionary interest of the lessor arose by operation of law when the leasehold was carved out of the fee simple title. It is a vested future interest to commence after the termination of the lease. In the case of a tangible res, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences. The legal consequences of a debtor's possession at the time of bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession, and the bankruptcy court acquires summary jurisdiction *in rem* to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible asset.

In the instant case, the law limits the possession of the leased property to the duration of the lease, while it attaches to the ownership of the reversion in fee the legal consequences of possession. Such reversion, not being owned by the bankrupt at the time of bankruptcy, is in legal contemplation not now in possession of the bankruptcy court; and, since the law attributes to its mere ownership the legal consequences of possession, the bankruptcy court has no jurisdiction in rem of said reversionary interest, because the law also attributes to ownership the jurisdictional consequences of possession adversely held by a third party under a bona fide claim of ownership. Possession of the res is the basis of the bank-

ruptcy court's exclusive and summary jurisdiction in rem, and neither actual nor constructive possession of the railroad's reversionary interest in the leased property is present in the case before the court.

As to the order under review being appealable to this court, Section 24 of the Bankruptcy Act, as amended, 11 U. S. C., Sec. 47, invests this court with appellate jurisdiction from the several courts of bankruptcy in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact, with provisos that are not pertinent here. Undoubtedly this appeal is from an interlocutory order. If it is from an interlocutory order in a proceeding in bankruptcy, it is appealable; if it is from an interlocutory order in a controversy arising in proceedings in bankruptcy, it is not appealable. *Universal Oil Products Co. v. Cosden Petroleum Corporation*, 178 F. (2) 495.

Since the court below was proceeding in a summary way, that is by calling on the lessor to show cause why the relief sought should not be granted, instead of summoning the defendant by formal process to appear and answer the petition, this order should be regarded as a proceeding in bankruptcy, though it also was made in a controversy arising in proceedings in bankruptcy. In other words, the order appealed from has dual characteristics, and may be regarded in a dual aspect. The question is not free from doubt; in form it is a proceeding in bankruptcy; in substance it is a controversy arising in a proceeding in bankruptcy. *Albin v. Cowing Joint Co.*, 317 U. S. 211; in re Margolies, 266 Fed. 203; In re Hotel Governor Clinton, 107 F. (2) 398; *Columbia Foundry Co.*

v. Lochner, 179 F. (2) 630; *Theard v. Fid. & Dep. Co.*, 202 F. (2) 880; Collier on Bankruptcy, Section 24.39, p. 790.

The distinction between proceedings and controversies arising in proceedings is sometimes so close that the solution depends upon the manner in which the bankruptcy court's jurisdiction is invoked, as well as on the character of the proceeding involved. In the instant case, the trustee, the referee, and the district judge, all three, evidently regarded it as a proceeding in bankruptcy, and it has been necessary for us to decide the jurisdictional issue on the merits in order to determine whether or not the interlocutory order was appealable. In such circumstances the appeal should be allowed.

Accordingly, the judgment appealed from is reversed and the cause remanded to the district court with directions to dismiss the petition.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS,

holding sessions at Houston

In the matter of

DOUGLASS SULPHUR CO.,

Bankrupt

No. 2216 in Bankruptcy

OPINION OF THE COURT

Baker, Botts, Andrews & Parish (Ben White), of Houston, Texas; for Texas and New Orleans Railroad Company.

Fred Much, of Houston, Texas; for Trustee in Bankruptcy.

Virgil Childress, of Houston, Texas; for Ranger Chemical Company.

Elbert Roberts, of Houston, Texas; Referee in Bankruptcy.

February 27, 1953.

Kennerly, Chief Judge:

Originally this was a proceeding for the corporate reorganization of the Douglass Sulphur Company. No Plan having been approved, such Company was adjudged a Bankrupt on April 10, 1950, and the case referred to a Referee in Bankruptcy. This is a hear-

ing under Local District Court Rule 25 of the Petition of the Texas and New Orleans Railroad Company (for brevity called Railroad Company) to Review an Order of the Referee denying the Motion of Railroad Company to Dismiss a Petition by the Trustee to require Railroad Company to convey to Trusttee, in accordance with the provisions of a Lease between Bankrupt and Railroad Company, certain property covered by such Lease. The matter of the construction and enforcement of such Lease has heretofore been before the Referee, this Court, and the Court of Appeals of this Circuit in summary proceedings brought by Railroad Company. For a statement of such proceedings see Texas & New Orleans Railroad Co. v. Phillips, 196 Fed. (2d) 692.

It will be observed that it is settled by such proceedings (a) that such lease has not been terminated, (b) that it has been timely assumed by the Trustee, and (c) that the Trustee is entitled to purchase from Railroad Company the property covered thereby for $30,000 cash.

Seasonably upon the coming down of the Mandate of the Court of Appeals, the Trustee tendered Railroad Company $30,000 in cash, and requested Railroad Company to execute and deliver to him a Deed to such property. This tender Railroad Company refused to accept and also refused to execute and deliver a Deed. Thereupon, the Trustee filed with the Referee his Motion and Petition, setting forth the facts, and praying for an Order requiring Railroad Company to execute and deliver such Deed. Also that Trustee be awarded damages against Railroad Company for the failure of Railroad Company to

execute and deliver such Deed.[1] Thereupon, the Referee signed an Order, which was duly served on Railroad Company, requiring it to show cause why such Deed should not be so executed and delivered. Railroad Company then moved to dismiss such Motion and Petition of the Trustee, the Referee denied such Motion to Dismiss,[2] and Railroad Company has brought this Petition to Review his action.

The Referee's Certificate contains the following Findings of Fact:

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[1] The Prayer in the Trustee's Motion and Petition is as follows:

> "Wherefore, premises considered, the Trustee prays that this Court issue citation to the Railroad, ordering it to appear herein and show cause why it should not deliver to the Trustee the deed to the Harrington Street property provided for in the above described Lease; and that upon final hearing the Trustee have judgment against the Railroad decreeing specific performance of the Railroad's obligation to deliver a deed to the Harrington Street property and requiring the Railroad to deliver such deed to the Trustee upon pain of contempt; that the Trustee further be awarded such damages as may have been sustained by the Railroad's breach and delay of its obligation to deliver such deed; that the Trustee recover his costs herein; and that the Trustee have such other and further relief as is just and to which he may show himself duly entitled."

[2] Such Order, dated January 15, 1953, is as follows:

> "On the 21st day of November, A. D. 1952, at Houston, Texas, came on for hearing the Motion of the Texas and New Orleans Railroad Company to dismiss for lack of jurisdiction the petition of the Trustee, H. A. Phillips, for relief and appropriate orders requiring the Texas and New Orleans Railroad Company to show cause why they should not be required to execute and deliver a deed to the Harrington Street property provided for in the lease between the Douglass Sulphur Company and Texas and New Orleans Railroad Company and for further relief as prayed for in said Petition and the Motion of the Texas and New Orleans Railroad Company

"I find that the bankrupt was in possession of the property at the time of the filing of the petition for reorganization and that the Bankruptcy Court has been in possession, through its trustee, from the time of the appointment of said trustee and is still in possession of the property. I find that the trustee, on or about August 29, 1952, tendered to the Railroad Company $30,000.00, requesting a deed to the Harrington Street property, and which tender was by the Railroad Company refused."

1: As its first point, Railroad Company says that in effect this is a suit or proceeding against it for

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to make Ranger Chemical Company a party to said proceedings.

The interested parties appeared and submitted the Motion to dismiss and the Motion to make parties on the record and without further hearing of evidence, the Referee requested of the parties that they each file their written arguments and briefs, outlining their position and the authorities supporting such position, and thereafter, on the 2nd day of December, 1952, the Trustee, H. A. Phillips, through his attorney, Fred Much, filed his argument and brief, and on the 15th day of December, 1952, the Texas and New Orleans Railroad Company, through its attorney, Baker, Botts, Andrews & Parish, by Ben White, filed its reply to the Trustee's memorandum, and the Referee, reviewing the record and examining the briefs and argument of counsel, is of the opinion that the Motion to dismiss and the Motion to make parties should be in all things over-ruled and denied. The Referee is of the opinion that the Bankruptcy Court, having rightful possession of the property subject to the litigation, has jurisdiction to deal with all interests claimed in it or charges on it so as to dispose of it fully and may do so summarily according to the usual practice in bankruptcy.

It is, therefore, ordered that the Motion of the Texas and New Orleans Railroad Company to dismiss and the Motion of the Texas and New Orleans Railroad Company to make parties is, and the same is, hereby in all things denied.

Done at Houston, Texas, this the 15th day of January, A. D. 1953."

specific performance, and that the Referee has no jurisdiction. It says that although in the summary proceeding mentioned (Texas & New Orleans Railroad Co. v. Phillips, supra), it has been finally held that the Trustee is legally entitled, upon the tender to it of $30,000 cash, to purchase such property, the Referee is without jurisdiction to require it to execute and deliver a Deed of the property to the Trustee. I think such contention is without merit.[3] I think that by instituting and prosecuting the former summary proceedings, Railroad Company consented not only to such former proceedings, but also to the present proceeding, whether the present proceeding be regarded as a continuation of the former proceedings, or as a proceeding to enforce the decrees and orders of the Referee and Courts in the former proceedings, or whether it be regarded as a new proceeding.

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[3] The Referee also so concludes. I quote his Conclusions of Law:

"I conclude that in view of the fact that the Railroad Company voluntarily entered its appearance and asked for affirmative relief in connection with the possession of this property, and in view of the fact that the property had been in the custody of the Court from the filing of the petition for reorganization up to and including the present time that the Bankruptcy Court has jurisdiction to summarily hear and determine all issues in connection with said property and require the Railroad Company to execute and deliver a deed.

I conclude that if I be mistaken in the finding that the Railroad Company voluntarily entered its appearance in connection with the possession of said property that, nevertheless, the property was in the possession of the bankrupt and such possession continued in the Court and the trustee, that the Bankruptcy Court has jurisdiction to deal with all interests claimed in it or charges on it so as to dispose of it fully and may do so summarily according to the usual practice in bankruptcy."

A review of the record in the former proceedings shows that:

(a) On May 10, 1950, Railroad Company filed with the Referee its Petition to Terminate such Lease. In its prayer,[4] it asked that the Lease be adjudged to be terminated and that the Trustee be ordered to surrender possession of the leased premises to Railroad Company.

(b) On October 26, 1950, Railroad Company filed with the Referee its Motion to set aside an Order entered by the Referee accepting the bid of the Ranger Chemical Company for such property.[5]

(c) On a date not shown on the Petition itself, but which the Referee says was December 7, 1950, Railroad Company filed with the Referee its First Amended Original Petition. In its prayer,[6] it asks

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[4] Its Prayer is as follows:

> "Wherefore your Petitioner prays that the terms of the lease attached hereto be adjudged terminated and that the Trustee in Bankruptcy be ordered to surrender possession of the leased premises without further delay to Texas and New Orleans Railroad Company, your Petitioner."

[5] Its prayer in such Motion is as follows:

> "Wherefore, your Petitioner, in the alternative to its motion to terminate the lease, prays that the order accepting the bid of the Ranger Chemical Company for the so-called Harrington Street leasehold estate be set aside and that the said option be ordered terminated."

[6] Such prayer is as follows:

> "Wherefore, your Petitioner, in the alternative prays:
>
> (1) That this Court order H. A. Phillips, Trustee in Bankruptcy, to vacate and surrender possession of the said prem-

that the Court declare such lease terminated under its terms, that the Trustee be required to vacate and surrender possession of such property to Railroad Company, that the Court determine that the option to purchase contained in the lease is a right personal to the Bankrupt which cannot be exercised by the Trustee, etc. Also that the Order accepting the bid of the Ranger Chemical Company for the property covered by the Lease be set aside, etc.

(d) The Trustee filed Answer June 20, 1950, August 11, 1950, and September 26, 1950.[7]

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ises to Petitioner by reason of said alleged lease having been rejected by the Trustee; or

(2) That this Court declare the said lease terminated under its terms and order H. A. Phillips, Trustee in Bankruptcy, to vacate and surrender possession of said premises to Petitioner; or

(3) That this Court determine that the option to purchase contained in said lease is a right personal to Bankrupt and cannot be exercised by the Trustee in Bankruptcy, that the order accepting the bid of Ranger Chemical Company for the so-called Harrington Street leasehold estate be set aside and that the said option be ordered terminated; and

That your Petitioner have such other and further relief as is just and to which it may show itself duly entitled."

[7] The prayer in the Trustee's pleading of September 26, 1950, is as follows:

"Wherefore, Petitioner respectfully prays that this Honorable Court enter an order authorizing the Trustee to give notice to the Texas & New Orleans Railroad that he is exercising the option above quoted in the above described Lease on behalf of the estate of the bankrupt, Douglass Sulphur Company, and to tender and pay over to the said Railroad at the time of the delivery of the deed the amount of $5,000.00 cash and to make such further agreements and payments and to take such further actions as are necessary to complete the exercise of such option and the acquisition of the aforesaid premises under such option and for such other authority with respect thereto as may be appropriate."

(e) The Referee denied Railroad Company the relief prayed for, and Railroad Company filed its Petition and Supplemental Petition to Review the action of the Referee and actively prosecuted same to final judgment. Texas & New Orleans Railroad Co. v. Phillips, supra.

That a claimant such as is Railroad Company may by his action consent to a proceeding such as is the present proceeding is well established. See Page v. Arkansas Gas Corporation, 286 U.S. 270. MacDonald v. Plymouth, 286 U.S. 263. The cases cited by Railroad Company are shown in the margin.[8]

I conclude that when Railroad Company consented to the jurisdiction of the Referee in the former proceedings involving such Lease and the property covered thereby, it thereby consented to the jurisdiction of the Referee with respect to all questions between the Trustee and Railroad Company involving such Lease or the property covered thereby, and including this proceeding. As stated, the Referee so concluded.[9]

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[8] The authorities cited by Railroad Company are as follows: Chandler v. Perry, 74 Fed. (2d) 371. Dreyer v. Perkins, 217 Fed. 869. In re Ballou, 215 Fed. 810. In re Bondurant Hardware Co., 231 Fed. 247. Personal Finance Co. of Colorado v. Day, 126 Fed. (2d) 281. Cline v. Kaplan, 323 U.S. 97. Looney v. Sun Oil Co., 170 S.W. (2d) 297.

[9] The authorities cited by the Trustees are as follows: Cline v. Kaplan, 323 U.S. 97. Bachman v. McCluer, 63 Fed. (2d) 580. Gramil Weaving Corp. v. Raindeer Fabrics, Inc., 185 Fed. (2d) 537. In re California Eastern Airways, Inc., 95 Fed. Supp. 348. Lilienstein v. Carberry, 92 Fed. (2d) 612. In re Prokop, et al.,—Heyer, et al., v. Schwemer, 65 Fed. (2d) 628. John B. Page, Trustee, v. Arkansas Natural Gas Corp., 52 S. Ct. 507, 286 U.S. 269, 75 L. Ed. 1096. Operators' Piano Co. v. First Wisconsin Trust Co., 283 Fed. 904. James Talcott, Inc. v. Glavin, 104 Fed. (2d) 851, cert. denied, 60 S. Ct. 130. People's National Bank of Strasburg v. Green, 296 Fed. 294.

In Collier on Bankruptcy (14th Edition), Section 23.08, Paragraph 1, with respect to the summary jurisdiction of a Bankruptcy Court, it is said in the text:[10]

"Once consent to the summary jurisdiction of the Bankruptcy Court appears, that jurisdiction will be retained for the determination of all the claims of the parties and for the enforcement of all their rights against each other. 9 Consent having been given, it may not subsequently be withdrawn by a party; 10 nor may the party, upon appeal from the decision, raise the question of want of jurisdiction.[11]

Where an adverse claimant is himself a petitioner for relief in a summary proceeding brought by a trustee, he opens the door to such defenses as the trustee

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[10] The notes to this text are as follows:

[9] "In re Blake (C.C.A., 8th Cir.), 17 Am. B. R. 668, 150 Fed. 279. See also Philips v. Turner (C.C.A., 5th Cir.), 8 Am. B.R. 171, 114 Fed. 726; Honeyman v. Hughes (C.C.A. 9th, 1946), 156 F. (2d) 27.

[10] Operators' Piano Co. v. First Wisconsin Trust Co. (C.C.A., 7th Cir.), 49 Am. B.R. 545, 283 Fed. 904; Matter of Prokop (C.C.A., 7th Cir.), 23 Am. B.R. (N.S.) 375, 65 F. (2d) 628; Honeyman v. Hughes, supra, n. 9.

[11] In re Bacon (C.C.A., 2d Cir.), 20 Am. B.R. 107, 159 Fed. 424; Philips v. Turner (C.C.A., 5th Cir.), 8 Am. B.R. 171, 114 Fed. 726; Boonville National Bank v. Blakey (C.C.A., 7th Cir.), 6 Am. B.R. 13, 107 Fed. 891; Honeyman v. Hughes, supra, n. 9.

Review by District Court of referee's order.—In Matter of Loring (D.C. Mass. 1939), 42 Am. B.R. (N.S.) 875, 30 F. Supp. 758, the Court said: 'It is suggested in the trustee's brief, that question may be raised as to the jurisdiction of the referee to order in summary proceeding the payment to the trustee of the alleged preference. The record is barren of any intimation that Dutchland objected to the proceedings before the referee, and it is now too late to raise the question of jurisdiction.' See also n. 51, infra.

in bankruptcy possesses, and all such issues and all such defenses, including affirmative claims, may be properly litigated in such proceeding. Operators' Piano Co. v. First Wisconsin Trust Co. (C.C.A., 7th Cir.), 49 Am. B.R. 545, 283 Fed. 904; Matthew v. Coppin (C.C.A., 9th Cir.), 14 Am. B.R. (N.S.) 19, 32 F. (2d) 100.

Consent, as hereafter demonstrated, may be express or by waiver through failure to raise the proper objection, or may be shown by any act indicating a willingness on the part of the party that his claim or interest be determined summarily by the Bankruptcy Court." [12]

2: Railroad Company also contends that the Trustee's Motion and Petition, seeking to require it to execute and deliver such Deed, should be dismissed, because the Ranger Chemical Company was not made a party thereto. The connection of the Ranger Chemical Company with these transactions is shown by the Referee's Findings, as follows:

"The Railroad Company came into the Bankruptcy Court asking for a relief involving the lease and the option of purchase which was resolved against it. The trustee has sold the property to the Ranger Chemical Company and is ready to deliver title and collect the consideration upon receiving a deed from the Railroad Company, and the purchaser can be required to comply with his bid as and when the trustee can deliver a deed, and the Bankruptcy Court

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[12] The consent does not have to be formal. Matter of Pinsky-Lapin & Co., Inc. (C.C.A., 2d Cir.), 37 Am. B.R. (N.S.) 576, 98 F. (2d) 776; In re Read-York, Inc. (C.C.A., 7th, 1945), 152 F. (2d) 313; Honeyman v. Hughes, supra, n. 9.

As instances where consent was not found, see Matter of Bergstrom (C.C.A., 7th Cir.), 5 Am. B.R. (N.S.) 16, 1 F. (2d) 288; Matter of Schoenberg (C.C.A., 2d Cir.), 25 Am. B.R. (N.S.) 262, 70 F. (2d) 321."

is not required to anticipate the possibility of purchaser failing to comply with his bid."

I think that under these findings of the Referee, such contention of Railroad Company is not meritorious.

From what has been said, it follows that the Order of the Referee should be and it is affirmed. Let appropriate Order be drawn and presented.

The Clerk will file this opinion, and it is adopted as Findings of Fact and Conclusions of Law.

(S.) T. M. KENNERLY,
Judge.

Office - Supreme Court,
FILED
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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1954

No. 428

H. A. PHILLIPS, Trustee
FOR THE DOUGLASS SULPHUR COMPANY, Bankrupt,
Petitioner,

v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Douglass Sulphur Company, now bankrupt, was the lessee under a certain lease of real property in Houston, Harris County, Texas, in which Texas and New Orleans Railroad Company, Respondent herein, was lessor. On September 26, 1952, the Petitioner, H. A. Phillips, Trustee in Bankruptcy of Douglass Sulphur Company, filed his original complaint with the Referee in Bankruptcy seeking, as lessee, to purchase the reversionary interest of the lessor, Respondent herein. The summons was served on Respond-

ent on October 2, 1952, and on October 21, 1952, Respondent, by way of reply filed its Motion to Dismiss for lack of jurisdiction. Petitioner's suit was in the form of a suit for specific performance of an alleged option to purchase contained in the original lease.

Respondent's Motion to Dismiss was denied by the Referee and by the United States District Court for the Southern District of Texas but was allowed by the United States Court of Appeals for the Fifth Circuit. The Petitioner then filed the petition for writ of certiorari here involved.

Prior to the instant case, a summary proceeding in which Texas and New Orleans Railroad Company attempted to have the lease in question declared terminated was tried to a conclusion adverse to the lessor, ending by mandate issued on August 2, 1952, by the United States Court of Appeals for the Fifth Circuit. As stated, the independent action here involved was not instituted until September 26 of that same year, some two months after the mandate issued in the other case.

Statutes Involved

The only statute actually in issue is 11 USC 46, subparagraph b, which states:

> "b. Suits by the Receiver and the Trustee shall be brought or prosecuted only in the Courts where the Bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the Defendant, except as provided in Sections 60, 67 and 70 of this Act."

Questions Presented

1. Absent consent, does the Referee, in a suit by the Trustee for a bankrupt lessee, have summary jurisdiction of the reversionary interest of the lessor?

2. Does participation in *prior* summary proceeding before a Referee in Bankruptcy constitute consent to the Referee's summary jurisdiction of all *subsequent* plenary proceedings?

Reasons Why Petition Should Be Denied

Respondent would respectfully show the Court that the petition for writ of certiorari should not have been filed, and should be denied, for the following reasons:

(1) Question 1 is answered by a recent and clearly applicable decision of this Court and any variation in this fact situation presents no matter of sufficient public concern to warrant the allowance of the writ under Rule 19 1(b).

(2) As to question 2, it is frivolous to pose this problem to this Supreme Court since:

(i) That the answer to this question is in the negative would appear to be the only conclusion to be reached from a consideration of the decided cases, even those cited by Petitioner.

(ii) The question of consent is now controlled by a Federal Statute enacted subsequent to the filing of this case and, therefore, not here involved.

Argument

I.

Question 1 is answered by a recent and clearly applicable decision of this Court and any variation in this fact situation presents no matter of sufficient public concern to warrant the allowance of the writ under Rule 19 1(b).

The problem presented in Question 1, as to whether a Referee in a case involving a bankrupt lessee, has summary jurisdiction of the reversionary interest of the lessor, has

recently been decided in the negative in the case of *Benton* v. *Callaway*, 336 U.S. 132 (1949). To the precise question here presented, this Honorable Court stated, at p. 148:

> "We conceive the jurisdiction asserted by the District Court over a solvent lessor not in reorganization to be an extension of these traditional powers (of a bankruptcy court) not justified by any provisions of the Bankruptcy Act."

The anomalous situation anticipated by the Court in the cited case is no less presented in this case. As stated by the United States Court of Appeals for the Fifth Circuit in its opinion, 165 F. 2d 877, concerning *Benton* v. *Callaway*:

> "Such reversion, not being owned by Central at the time its petition for reorganization was filed, is in legal contemplation not now in possession of the Bankruptcy Court; and, since the law attributes to its mere ownership, the legal consequence of possession, the Bankruptcy Court has no jurisdiction in rem of said reversionary interest."

This question having been clearly and succinctly disposed of in the cited cases, there is no additional important question of Federal law to be decided in this case. While an option to purchase is alleged, the reversion here involved is no less "not owned" by Douglass Sulphur Company under applicable decisions than was true in the cited case. It would fulfill no public purpose for this Honorable Court to again reiterate what was said in the cited cases.

II.

As to question 2, it is frivolous to pose this problem to this Supreme Court since:

(i) That the answer to this question is in the negative would appear to be the only conclusion to be

reached from a consideration of the decided cases, even those cited by Petitioner.

(ii) The question of consent is now controlled by a Federal Statute enacted subsequent to the filing of this case and, therefore, not here involved.

As previously pointed out, the Petitioner filed his original complaint with the Referee in Bankruptcy on September 26, 1952, and a motion to dismiss for want of jurisdiction was properly filed by the Respondent in October, 1952. Effective October 7, 1952, Section 2 (a) (7) of the Bankruptcy Act, 11 U.S.C. 11 (a) (7), was amended to now read, in part, as follows:

> "* * * and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the Court of Bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of Court or fixed or extended by order of Court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed as consented to such jurisdiction;"

Due to the fact that this statutory amendment became effective (October 7, 1952) after the filing of this case by petitioner (September 26, 1952), its interpretation is not here involved. However, it serves to demonstrate conclusively that no important Federal question is here involved, since, even if a consent problem is raised by these facts, its determination by this Court would apply only to this case. The decision of this Court would be meaningless since any future case involving this or similar facts would be controlled by the interpretation of the provisions of the statutory amendment above cited. In fact, no real question of consent is here involved. Had the statute been effective prior to the filing of this suit by Petitioner, Respondent

would have clearly complied with its terms since its motion to dismiss for want of jurisdiction was filed within nineteen days following the service of summons upon it.

It is true that the Respondent participated in a prior summary proceeding before the Referee, which was litigated to conclusion long before the present plenary suit was brought by the Trustee. If the present suit had been filed by way of cross-action in the prior proceeding, and had it then proceeded to final judgment without objection on the part of this Respondent, under applicable decisions Respondent would have then consented to the summary jurisdiction of the Referee there exercised. However, the Petitioner did not choose to so proceed. Under *Cline* v. *Kaplan,* 323 U.S. 97 or any other controlling case, the participation by one party in a summary matter (theretofore heard independently and finally) does not forever thereafter subject that person to the summary jurisdiction of that particular Referee in all subsequent plenary matters. To so argue is to attempt to pervert the concept of "consent" into a rule of universal summary jurisdiction not contemplated by the controlling statutes or the cases heretofore interpreting them. Certainly, if basic logic is to be considered, no factor or element termed "consent" can be distilled from a fact situation such as that here presented, where Respondent has voiced its protest continuously since the filing of the action.

Petitioner has presented a rather formidable mass of material alleged to be in conflict with the decision of the U. S. Court of Appeals for the Fifth Circuit in this case. That none of these cases are even remotely in conflict with such decision is demonstrated in an appendix attached hereto. Certainly Petitioner is not serious in urging that this Supreme Court should apportion its valuable time to the consideration of so strained a point, when its decision, in any event, would be a one-shot proposition, having no

applicability after October 7, 1952, the effective date of the amendment of Section 2(a)(7) of the Bankruptcy Act, 11 U.S.C. 11 (a) (7).

Conclusion

This case involves two questions, the first of which has been previously considered and decided by this Honorable Court (and this decision is correctly applied by the United State Court of Appeals for the Fifth Circuit) and the second of which will hereafter turn upon the interpretation of a subsequently enacted statute, the interpretation of which is not here involved. The petition should be denied.

Respectfully submitted,

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APPENDIX

U. S. Supreme Court and U. S. Circuit Court cases in the order cited in Petitioners Petition for Writ of Certiorari:

1. *Page* v. *Arkansas Gas Corp.*, 286 U.S. 269 (1932). This Court found "consent" where the Trustee *answered* seeking relief of a plenary nature in an affirmative action brought by the third party and where the entire matter (both the original complaint and cross-action) proceeded to final judgment without objection to the exercise of summary jurisdiction by the referee. And see the comments on this case in *Page* v. *Chandler*, infra.

2. *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932). This Court simply held that, with the respondent consenting in open court to trial before the referee, the referee had the power to hear an admitted plenary matter.

3. *Cline* v. *Kaplan*, 323 U.S. 97 (1944) is even less comfort to the petitioner than those cases heretofore cited. In line with the ordinary concept of jurisdiction by consent, this Court held that the objection to jurisdiction could be voiced at any time prior to final judgment.

4. *Bachman* v. *McCluer*, 63 F. 2d 580 (8th CCA, 1933). Where the matter was litigated summarily without objection, jurisdiction was conferred by consent.

5. *Gramil Weaving Corp.* v. *Raindeer Fabrics, Inc.*, 185 F. 2d 537 (2nd CCA, 1950) is a simple case of consent, holding that petitioner by filing its voluntary affirmative action, thereby consented to plenary defenses to such affirmative action being heard in the same proceeding.

6. *Lilienstein* v. *Carberry* (*In re Murray*), 92 F. 2d 612 (7th CCA, 1937). Consent found where question of jurisdiction raised for first time on appeal.

7. *In re Prokop,* 65 F. 2d 628 (7th CCA, 1933). Involves an agreed stipulation, concerning jurisdiction among other things, which the courts enforced against the parties.

8. *Operators Piano Co.* v. *First Wisconsin Trust Co.,* 283 Fed. 904 (7th CCA, 1922). This is a case of doubtful applicability since the court held that the jurisdiction involved was that of the U. S. District Court and not of the bankruptcy court.

9. *James Talcott, Inc.* v. *Glavin,* 104 F. 2d 851 (3rd CCA, 1939) held that the referee had jurisdiction of a plenary matter filed as a *counterclaim* to an affirmative action brought by a third party.

10. *Peoples Nat. Bank* v. *Green,* 296 Fed. 294 (4th CCA, 1924). Consent found since Bank did not object to summary jurisdiction over the Bank's own affirmative petition until after court ruled adversely on it.

11. *Hyman* v. *McLendon,* 140 F. 2d 76 (4th CCA, 1944). Of doubtful interest since the court held, simply, that with the other parties consenting, the trustee could not object to the exercise of summary jurisdiction by the Referee.

12. *White* v. *Steinman,* 120 F. 2d 799 (2nd CCA, 1941). Filing of affirmative action constituted consent to determine defensive matters.

13. *Walker* v. *Leach,* 158 F. 2d 15 (10th CCA, 1946). Simple case of consent by voluntarily appearing and participating in case without objection as to jurisdiction.

14. *Fish* v. *East,* 114 F. 2d 177 (10th CCA, 1940). Very complicated case involving, relative to the question of consent, an agreement in open court.

15. *Susquehanna Chemical Corp.* v. *Producers Bank & Trust Co.,* 174 F. 2d 783 (3rd CCA, 1949). No objection raised to court's summary jurisdiction.

16. *In re Mt. Forest Fur Farms of America,* 122 F. 2d 232 (Cir. Ct. of Ap., 1941) gives the petitioner little comfort. The Court here found an absence of consent where the third party opposed vigorously the exercise of summary jurisdiction by the District Court, as has been done in the instant case.

17. *In re Knott,* 134 F. 2d 833 (6th CCA, 1943). This Court found consent from a failure to object to a trial on the merits.

18. *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478 (1940). This Court found summary jurisdiction by reason of possession of land under claim of fee title ownership (a fact situation not remotely presented in the instant case) but held that, as a discretionary matter, the trustee should be ordered by the bankruptcy court to proceed in the Illinois courts.

19. *Chandler* v. *Perry,* 74 F. 2d 371 (5th CCA, 1934). As indicated in the quotation in the petition this case also involves jurisdiction by reason of possession under claim of absolute ownership. Actually more important to a determination of the instant case, involving as it does a suit for specific performance, is the Court's interpretation of *Page* v. *Arkansas Natural Gas Corp., supra,* which is as follows:

> "We do not say that he (the referee) can without consent make a formal decree of cancellation, or reformation, or specific performance, but that he can ascertain who owns the property and who will be entitled to its proceeds when sold. In *Page* v. *Arkansas Natural Gas Corp.* (CCA), 53 F. 2d 27, the referee ordered a conveyance and was sustained on the ground that the trustee had possession of the oil and gas-leasehold involved, and also on the ground that the claimant had consented to the referee's jurisdiction. *The Supreme Court sustained the order on the ground of consent alone, intimating that otherwise a plenary*

suit is necessary to compel a conveyance. 286 U.S. 269, 52 S. Ct. 507, 76 L. Ed. 1096." (Parenthetical remarks and emphasis added.)

After considering these cases, it is obvious from the most casual observation that none of these cases even remotely support the position of the Petitioner. It is true, as these courts repeatedly point out, that it is possible to confer jurisdiction upon the referee in bankruptcy by consent. It is quite a different matter, however, to say that these cases indicate that any prior participation in a hearing before such referee, no matter how remote in time or in subject matter, constitutes a continuing and perpetual consent to the exercise of summary jurisdiction by such referee over subsequent, independently handled, plenary matters. That this multitude of "consent" cases involves nothing more than concurrently heard summary and plenary matters is a rather conclusive indication that "consent" has not heretofore been considered to have any continuing, perpetual character.

I, Ben White, an attorney in the office of Messrs. Baker, Botts, Andrews & Shepherd, attorneys of record for Texas and New Orleans Railroad Company, respondent herein, depose and say that on the ..... day of December, 1954, I served a copy of the foregoing Brief for Respondent in Opposition on the petitioner, H. A. Phillips, Trustee in Bankruptcy for Douglass Sulphur Company, Bankrupt, by delivering the same to Fred Much, counsel of record for said petitioner, located at Houston, Texas.

.....

BEN WHITE

SUBSCRIBED AND SWORN TO before me, at Houston, Texas, this ..... day of December, 1954.

.....

Notary Public in and for
Harris County, Texas